

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2540

ORIGINAL

To be argued by
ROY C. HOPGOOD

United States Court of Appeals

For the Second Circuit

B

P/s

ABERCROMBIE & FITCH COMPANY,

Plaintiff-Appellant,

v.

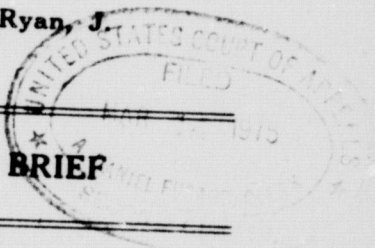
HUNTING WORLD, INCORPORATED,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

Civil Action No. 70 Civ. 377, Ryan, J.

PLAINTIFF-APPELLANT'S BRIEF



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PLAINTIFF-APPELLANT'S BRIEF

This is an appeal (A 71) by Plaintiff Abercrombie & Fitch Company (Abercrombie) from the final judgment, entered October 15, 1974 (A 70), dismissing its complaint for trademark infringement. Appeal is also taken from the order denying reconsideration (A 69). Notice of Appeal (A 71) was timely filed.

History of Proceeding

This action was commenced on January 29, 1970 against the Defendant Hunting World, Incorporated (Hunting World), for infringement of Abercrombie's federal trademark registrations for the mark "Safari" for uses on a variety of goods.

Initially, Hunting World moved for summary judgment for trademark invalidity on the ground that "Safari" was descriptive. This motion was granted in part by the District Court, Hon. Morris E. Lasker, reported at 327 F.Supp. 657 (S.D.N.Y. 1971) (A 21). An appeal from this decision was taken to this Court which reversed and remanded for trial on the outstanding issues; 461 F.2d 1044 (2d Cir. 1972) (A 44). Trial on the case as remanded was had on November 29 and 30 and December 3 and 4, 1973, before Hon. Sylvester J. Ryan.

In his decision and judgment, Judge Ryan dismissed Abercrombie's complaint for trademark infringement and further directed the Commissioner of Patents to *cancel all* of Abercrombie's trademark registrations for the mark "Safari", including those not involved in this litigation. Abercrombie moved for reconsideration on the ground that all of its trademark registrations for "Safari" were not put in issue or made part of the trial record and were for uses on goods different from those involved in the litigation. The Court denied this motion (A 69) and entered judgment.

Questions Presented

The questions presented on appeal are:

I. Is the word "Safari" a valid trademark where it is not used descriptively or generically?

II. Are the uses of "Safari" by Hunting World descriptive uses recognized by law or are they non-descriptive infringing uses?

III. Must secondary meaning be proven to establish the validity of a common word trademark which is used on goods fancifully and non-descriptively?

IV. Did the District Court err in ordering the cancellation of *all* of Abercrombie's Federal and State registrations for "Safari" including those not in issue here without first examining the goods to which the marks are applied to determine whether the use is descriptive or fanciful or suggestive?

Statement of the Case

Plaintiff Abercrombie was organized in 1892 by Messrs. Abercrombie and Fitch as a sporting goods business and later incorporated in 1904 (A 80).

Abercrombie's business has expanded and it is doing business in every State in the Union, is known internationally (A 76-78), and has an extensive mail-order business. It has stores in New York City, Chicago, San Francisco, Colorado Springs, Troy (Michigan), Short Hills

(New Jersey), Bal Harbor (Florida), Palm Beach (Florida) (A 76-77). The Abercrombie stores are known to appeal to people who appreciate quality sporting and leisure wear clothes and goods.

Abercrombie's Registrations for "Safari"

Abercrombie's trademark use of "Safari" have ranged from caps and fishing hats to shirts, pants and shoes. The registrations themselves cover a large number of items.

In 1938, Abercrombie obtained Trademark Registration No. 358,781 (PX-3) for use of the mark "Safari" beginning in 1936 on:

Men's jackets, coats, trousers, breeches, shorts for outer wear, caps, hats and helmets, and women's coats, skirts for outer wear, trousers, breeches and hats.

It obtained Trademark Registration No. 652,098 (PX-5) in 1957 for:

Men's and women's shirts, shoes, belts, fishing vests, wading jackets and men's swim trunks.

It obtained Trademark Registration No. 703,279 (PX-7) in 1960 for:

Woven-cloth sporting goods apparel such as pants, shirts, skirts, dresses, shorts, sweaters, jackets, coats, raincoats, gloves, scarves, ties, hats, socks and underwear.

The 1938 registration (PX-3) was obtained under the 1905 Act, but in 1948 was refiled under the Lanham Act. The 1959 and 1960 registrations (PX-5, PX-7) have become incontestable under Sections 8 and 15 of the Lanham Act. Abercrombie has used these trademarks extensively for

about forty years. Thus, the Patent Office has recognized that the word "Safari" may function as a trademark in respect of non-descriptive goods.

**Abercrombie's Uses of "Safari"
Cover Many Clothing Items**

Abercrombie's clothing items which carry the "Safari" trademark label (PX-30) have expanded in number and include a wide spectrum of uses. For the Court's convenience, we have tabulated below the non-descriptive items in the present record:

Men's and Women's Garments

Bermuda jacket (PX-37) (A 113)
 Bermuda shorts (PX-35, 37) (A 109, 113)
 Belt (PX-37) (A 112)
 Golfing cap (PX-35) (A 110)
 Ladies stag pants (PX 36) (A 111)
 Men's suiting (PX-68) (A 244, 245)
 Of "Safari" cloth (PX-31, 36, 38) (A 103, 111, 244)
 Garment, culotte (PX-15, 33, 36) (A 91, 107, 111)
 Pants for hunting (PX-16) (A 91, 92)
 Ladies Slacks (PX-17) (A 92)
 Shirt, men's (PX-18, 31, 33, 35, 36) (A 93, 103, 109)
 Ladies short pants (PX-19, 33) (A 93, 106)
 Ladies shooting vest (PX-20) (A 94)
 Ladies shirt (PX-21) (A 94)
 Ladies light weight jacket (PX-22, 36) (A 94, 95, 111)
 Vest, men's (PX-23, 32, 33) (A 95, 96, 104, 106)
 Light weight jacket (PX-24, 33, 36) (A 96, 106)
 Ladies skirt (PX-25, 35, 36) (A 97, 109)
 Coat garment, suit coat (PX-26) (A 97, 98)

Men's heavy weight lined jacket (PX-27) (A 98)
Shooting vest, men's (PX-28, 31) (A 99, 103)
Slacks, trousers, men's (PX-29, 32, 35, 36) (A 99, 104, 111)
Men's shorts (PX-36) (A 104)

Men's and Women's Shoes

Women's shoes (PX-9, 34) (A 87, 109)
Men's shoes (PX-34, 66, 67) (A 109, 162, 244)
Boots breeches (PX-37) (A 112)

Men's and Women's Hats

Round hat, soft, general outdoor sportswear, leisure wear (PX-10, 33, 35) (A 89, 106, 108)
Fishing or outdoor cap, long visor, Canuck (PX-11, 33, 35) (A 89)
Fishing or outside wear, with vents (PX-12) (A 89)
Cap, short visor (PX-13) (A 90)
Snap brim, Aussie hat (PX-14, 32, 33) (A 90, 104, 107, 108)

Pictures of these items, rather than words, more easily convey the non-descriptive nature of these "Safari" trademarked products; some representative items in this litigation are shown below.

"Safari" marked ladies shoes (PX-9), and sneakers (PX-34, p. 13).



PX-34, p. 13

Abercrombie & Fitch
NEW YORK CHICAGO
SAN FRANCISCO
Safari

PX-30

"Safari" marked hats include "Safari" round hats (PX-33, p. 11), a leisure wear hat, golfing caps (PX-35, p. 17), "Canuck" hats (PX-33, pp. 120, 121) and the Aussie hat (PX-33, pp. 120, 121).



Safari® round hat. Exclusive sueded cotton. 6½ to 7¼. #49-20-5.50- (.50)

PX-33, p. 113



8 Safari® Cloth Swordfish Cap. Our "long-bill," a 4½" patent visor. Showerproof cotton. Sand. (1 lb.) 3.50

PX-35, p. 17



(E) Safari Aussie hat. A favorite with fishermen and campers, the down-under style hat with snap-up brim. Mosquito net rolls down to protect face and neck. Adjustable chin strap. Cotton. Sizes: 6½ to 7¼. #49-1001-10.50- (.80)

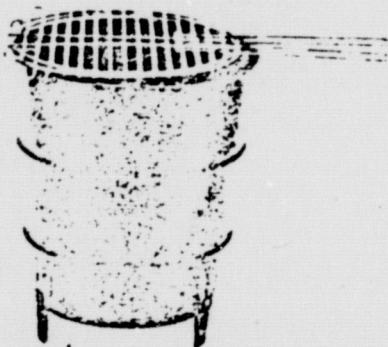
PX-33, pp. 120, 121



(A) Safari® Canuck cap. Flexible peak style. Made of our famous Safari sueded cotton, soft, lightweight. Tan. Size: 6½-7¼. #49-24-4.50- (.60)

PX-33, pp. 120, 121

Other items of clothing such as "Safari" shirts (PX-37, p. 35), "Safari" Bermuda shorts and skirts (PX-35, p. 15), ladies "Safari" culottes (PX-33, p. 131), as well as items outside the complaint, such as the "Safari" grill (PX-33, pp. 110, 111) are also shown.



Safari® Grill. Simplest, lightest grill to use for picnics —fits conveniently in station wagons. Cooks a delicious steak in 7 min. with balled-up newspaper. Cooks in 2 min. 24-gauge steel with nickel-plated steel telescoping grill. 13" high, 12½" diameter. Folds down to 3 nested sections.

#10-2292-10.95 (1.45)



Safari Cloth Shirt. The perfect hunting/camping shirt. In sizes 14½ to 18. 9.95

Mail and phone orders accepted

ABERCROMBIE & FITCH

NEW YORK CHICAGO SAN FRANCISCO

COLORADO SPRINGS

PALM BEACH SINGAPORE
NEW YORKER

PX-33, pp. 110, 111

PX-31, p. 100



SAFARI SHIRT (left)

Rugged but lightweight, man-tailored of ASF's own Safari Cloth. Sand color. Sizes 10-20. (2 lbs.) \$7.95

Safari Shirt. (Not Ill.) Short sleeve style in our own famous Safari Cloth. Sizes 10-20. (2 lbs.) \$7.95

PX-37, p. 35



E SAFARI® CLOTH BERMUDA SHORTS

Cotton with sueded hni-h, shower-proofed. Fly front, stitched crease, side pockets. Sand color. 24 to 34. (1 lb.)

10.50

Swiss Cotton Pullover. Wear it in or out. Moss green, red, gold or blue. S. M. L. (2 lbs.)

14.00

F SAFARI® CLOTH TROUSER/SKIRT

Our showerproofed cotton trousers that look like a slim skirt. Tailored in our work-room. Sand color. 10 to 20. (3 lbs.)

30.00

Safari short culotte made in our own work-room, looks like a skirt, yet is as easy to move in as shorts. In lightweight, sueded cotton; wears well. Natural. 8 to 20.

#59-414-30.00 (1.25)

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**Abercrombie's Sales and Advertising Under the
"Safari" Trademark Have Been Substantial**

"Safari" is an important trademark for Abercrombie. Abercrombie has sold a significant amount of men's and women's apparel, under the label "Safari" (PX-30) since 1936 (A 117, 118). The estimated total sales of such clothing under the "Safari" trademark is about \$19 million in the period of 1936 to 1970 (A 118).*

Abercrombie advertises extensively in all of the advertising media. It distributes approximately 2 million mail order catalogs annually, and has done so for at least the past 15 years.**

Abercrombie advertises in national magazines of the type exemplified by *The New Yorker*, *Sports Illustrated*, *Time* and *Life* (PX-31; A 101, 104-107); and also in well-known newspapers throughout the country such as *The New York Times*, *The Wall Street Journal*, *Chicago Tribune*, *San Francisco Examiner* (PX-31, 67, 68, 69; A 101, 102-105, 162, 244).

In the 34 year period during which sales of "Safari"-marked apparel totaled \$19 million, many millions of dollars were devoted to advertising expense in which "Safari"-marked goods appeared (PX-47, 47-A). In the recent

* Abercrombie's total sales of \$25,000,000 divide 50 percent of \$12.5 million for clothing (A 77-78, 120) and 10 percent of the clothing (A 118) for the "Safari" marked apparel, or over \$1 million per year.

** Approximately 400,000 to 450,000 mail order catalogs are distributed 3 or 4 times a year (A 76-80).

period (1956 to 1973), total advertising expenses were in excess of \$7.5 million.*

Ample basis existed for the Court's observation (A 121):

"They apparently do spend considerable money advertising Safari products, as evidenced by the exhibits that you have introduced, and also it is a fact of common knowledge."

Hunting World's "Safari" Uses Which Are Not in Good Faith Descriptive Uses Are Infringements.

Beginning in 1969, Hunting World departed from the clear descriptive use of "Safari" which Mr. Lee, its President, had previously used to advertise and promote African safaris. We contend it then began to use "Safari" in a trademark sense.

Hunting World began to use "Hippo Safari" and "Camel Safari Chukka" (PX-56, 65 (at page 69)) for shoes. These words are not used in a geographically descriptive sense. The shoes had brass buckles and were tanned and handcrafted in Europe (PX-56). Judge Lasker characterized the uses as "fanciful," 327 F.Supp. at p. 665 (A 38).

* These amounts are:

1965	\$915,325 (PX-47A)		
1966	\$796,246	1970	\$816,487 (PX-47)
1967	\$868,525	1971	\$841,677
1968	\$870,280	1972	\$957,222
1969	\$554,421	1973	\$890,305
Total: 1965-1973		\$7,510,488	

The Appeal to Status and Affluence

Hunting World originally promoted safaris to Africa. Its business expanded and the nature of its business evolved to the current mid-Manhattan department store. It sells directly to the public, advertising largely in *The New York Times* and *The Wall Street Journal*, and to the wholesale distributing business. There is no question that the expanded merchandising activities cater to the same sports-minded person who is likely to purchase the same or similar goods from Abercrombie.

Mr. Lee testified that his business is intended to appeal to customers who want a "status symbol" (PX-71, p. 53; A 394) and "to people that want distinctive gifts who may not particularly be outdoor people" (PX-71; A 377). He further testified his business was designed to "appeal to the more affluent segment of the society" (PX-71; A 377) and his products, advertised in *The New York Times* and *The Wall Street Journal* for "town and country use" (PX-44, 45; A 377) directed "to the well-dressed man for casual wear, not necessarily to a guy who wants to go on safari" (PX-71; A 378).

Hunting World used "Minisafari" with the symbol "TM" (PX-44, 45, 46 (p. 67), 49, 50) for a stylish hat.

Mr. Lee regarded "MinisafariTM" as his trademark (A 274-275). The following testimony being illustrative:

"THE COURT: I am concerned with—I want to know why you put the letters T.M. on there.

"THE WITNESS: Because I consider that the Minisafari in that hat band as applied to hats is our trade-

mark for that type of hat, but not for anything else.”
(A 275)

Mr. Lee stated that “Minisafari” was a “citified version” of the safari hat* and was “contrived really as a sport hat” (A 304). Mr. Lee answered the Court (A 303-304):

“THE COURT: It is worn on safari going up and down Fifth Avenue.

“THE WITNESS: Sure.” (A 304)

Hunting World filed trademark applications for “Minisafari” and “Safariland” (A 309).

Hunting World also used the mark “Safariland” to identify a department of its store from which clothing, hats and shoes are sold. Hunting World recognized the trademark significance of the mark Safariland and applied the trademark symbol “TM” next to the mark.

“Q. You have used the expression ‘Safariland’ as a trademark, you put the letters T.M. on the side of it.

“A. Yes.

“Q. What is that supposed to mean?

“A. It means that I consider the mark ours with respect to a retail store or a department in a retail store.

“Q. From which clothing, including hats and shoes, is sold?

“A. Yes.” (A 327)

With respect to “Safariland”, Lee stated “[t]hat is a trademark of ours” (PX-71; A 353).

* We do not complain about the use of “safari” when fairly used to describe a safari hat. A safari hat is a generic use and describes a wide-brimmed hat designed for use on safaris.

Summary of Argument

The sweeping decree of the District Court holding all of Abercrombie's "Safari" trademark registrations invalid is inconsistent with recognized principles of law.

In its decision, the Court observed that safari was an ordinary common word meaning a journey or expedition, particularly in Africa, and, from that springboard, held all of the "Safari" trademarks invalid, even those which admittedly were non-descriptively used. The Court said (A 63-64):

"The use by defendant of such expressions as 'mini-safari' to designate a small model of an actual safari hat, 'Safariland' to refer to a section of its store or to designate its trade newsletter; 'camel safari', 'Hippo safari', 'Safari chukka', to describe its shoes and boots; is a purely descriptive use to apprise the public of the *type* of product by referring to its origin and use. It matters *not* that the hat or shoe may not be used actually on safari by the purchaser or that *it is not fit for a safari*. In fact, plaintiff's 'Safari' shoes and hats admittedly were not fit for a safari; *the shoes looked like sneakers and the hat was a fishing hat.*" (Emphasis ours.)

The Court then said that the word "safari" is commonly used with wearing apparel and widely used by the general public and people in the trade. While this conclusion *may* apply, on one extreme to currently stylish jackets which are similar to those designed and traditionally employed on actual safaris and are known as bush jackets, the conclusion does not follow that "Safari" for sneakers or a fishing hat, or "Minisafari" for a sports hat,

or "Hippo Safari" or "Camel Safari" for shoes used in high style sportswear in this country are either descriptive uses, or generic uses.

A trademark does not become invalid if used by multiple parties unless the mark actually becomes generic or descriptive, or if the mark is in the nature of a laudatory expression. Multiple third-party uses, if rightful, may limit the scope of a mark, but so long as the use is suggestive or fanciful, the mark is valid. If the third-party uses are wrongful, they are of marginal relevancy.

The Court also ordered the cancellation of all of Abercrombie's trademark registrations for "Safari"—including those not part of this record—without giving due weight to Abercrombie's long and substantial investment in such mark going back over 40 years. The Court gave no weight to the presumption of validity of the registrations and, more importantly, did not evaluate those uses which were clearly non-descriptive and those uses which were descriptive.

The Court thus *entirely* disregarded the distinction between a word which cannot be protected *per se* as a trademark and the use of a word which is descriptive as to some goods, but is used suggestively or fancifully as to other goods.

Further, it was error for the Court below to require secondary meaning as a prerequisite to validity for uses which are not descriptive. Secondary meaning is not a requirement merely because the mark is a dictionary word; it is only for those uses which are descriptive, that sec-

ondary meaning is a prerequisite to validity. *W. E. Bassett Company v. Revlon, Inc.*, 435 F.2d 656, 661 (2d Cir. 1970).

"Hippo Safari," "Camel Safari" for stylish shoes and "Minisafari" for a stylish hat are trademark uses and are not fair uses "only to describe" under the trademark statute, 15 U.S.C. §1115(b)(4), and are infringements.

ARGUMENT

POINT I

"SAFARI" IS A VALID TRADEMARK FOR ABERCROMBIE'S USES.

We recognize that the word "Safari" has been used in current fashion circles in connection with bush jackets and pant combinations ordinarily associated with safaris to Africa. These jackets are characterized by multiple pockets, a belt, buttons in the front and perhaps epaulets. Indeed most of the advertising evidence offered by Hunting World to prove descriptiveness related to third-party uses of "Safari" with these jackets or jacket-pant combinations. See DX-A, D, E, I, J, K, U, S, AA, CC, DD, FF, GG, LL.

These uses, concededly, are relevant to show that *as to this style jacket or jacket-pant combination*, "Safari" is widely used. Other advertisements were for goods, such as guns or bags for use in hunting journeys and would be proper descriptive uses.

Other third party uses are not so protected. "Safari" is an attractive word as a trademark. That many others attempted to use it descriptively or as a trademark—some rightfully, some wrongfully—is not a valid basis for finding descriptiveness as to all products and that Abercrombie has no trademark rights.

The Court Erred in Treating the Word-Mark "Safari" in the Abstract

There are two separate distinctions that must be drawn—first, that between a generic word and a descriptive word; and, second, that between a descriptive and non-descriptive use of a word.* Trademark protection "focuses on the use of words, not on their nature or meaning in the abstract," *Venetianaire Corp. v. A & P Import Co.*, 429 F.2d 1079 (2d Cir. 1970), at page 1082.

A generic word is the name or identification of a product. Such words as "aspirin," "cellophane," "nylon," and "elevator" are generic designations; *DuPont Cellophane Co. v. Waxed Products Co.*, 85 F.2d 75, 81 (2d Cir. 1936); Calimafde, *Unfair Competition & Trademarks*, 1970, §502. In *W. E. Bassett Co. v. Revlon*, 435 F.2d 656, 661 (2d Cir. 1970) the Court stated that "generic marks are the actual names of the products themselves."

"Safari" is not a generic name for any product. It means a journey or an expedition. Safari clothes—either a safari hat or a safari jacket—are clothes designed for use on a safari. Such clothes can be used on 5th Avenue,

* Sometimes the words "generically descriptive" are used in trademark parlance. This usage has been criticized as being meaningless and confusing two distinct concepts. In *re Automatic Radio Mfg. Co.*, 404 F.2d 1391, 1395, fn. 4 (CCPA 1969).

but their name is derived from intended use. But, a "Safari" *sneaker* or a "Safari" *fishing* hat are arbitrary and fanciful uses of an ordinary word—Judge Ryan and Judge Lasker so ruled—and are clear examples of trademark uses.

A Non-Descriptive Use of an Ordinary Word Is a Valid Trademark

Contrary to what Judge Ryan said, it *does* matter whether the hat, shoe, sneaker or fishing hat are fit for use on a safari. Safari is not synonymous with "made in Africa."

In determining whether the use of "Safari" is a valid trademark or a descriptive use, the goods involved—those identified in the registrations—must be considered. *The Restatement of Torts*, §721, pp. 579-580, (Vol. III, 1938), develops this point:

"But, it is the significance of the designation in connection with the goods upon which it is used, not its abstract significance, which is determinative. Thus the word 'Plow' cannot be a trade-mark for plows, but it can be a trade-mark for tomato juice. Though 'Revolve' cannot be a trade-mark for revolving doors, it can be a trade-mark for headache pills. That a designation may have a suggestive significance in connection with the goods does not render it inappropriate for use as a trade-mark."

Following this principle, "Rainbow" is descriptive as to table glassware, but is a good trademark for kitchen utensils, bottle caps or garbage cans; *Rainbow Art Co., Inc. v. Sears Roebuck & Co.*, 99 F.Supp. 677 (S.D.W.Va. 1951).

A common word having a known meaning is thus a valid trademark when used in a non-descriptive sense. Callmann, *Unfair Competition, Trademarks and Monopolies*, 3d Ed., Vol. 3, §71.1 (e); *Telechron, Inc. v. Telicon Corp.*, 97 F. Supp. 131, 150 (D. Del. 1951); *Canal Co. v. Clark*, 80 U.S. 311, 322 (1871).

The Court Recognized the Distinction Between Non-Descriptive and Descriptive Use During Trial

During trial, Judge Ryan recognized the factual and legal distinction (A 214):

“The Court: That seems to be the crux of this whole case, gentlemen. There is no question but that Abercrombie & Fitch has a right, a legal right to the trademark ‘Safari’ when it is applied specifically to an article of merchandise.

“But you can’t take a word like that in terms used in everyday language to describe—the whole problem in this case as I see it is not the recognition of Abercrombie & Fitch’s right to the word ‘Safari’ as a trademark, but to the wording of an appropriate injunction.”

Judge Ryan again recognized this in his decision:

“In fact, plaintiff’s ‘Safari’ shoes and hats admittedly were not fit for a safari; those shoes looked like sneakers and the hat was a fishing hat.” (A 63-64).

Limiting our discussion for the moment to Abercrombie’s sneakers and fishing hats, we submit “Safari” is, *for use on such goods*, a valid trademark. “Safari” is not

their generic name; nor does "Safari" describe any quality, property, function or use, *Restatement of Torts*, §721; therefore, the mark is not descriptive.

Judge Lasker had said that the use of "Safari" as a mark for fishing caps was a "fanciful use of the word by the plaintiff" (327 F.Supp. at p. 664; A 36) and the use by plaintiff of "Safari" on a cotton cover and leather topped shoes were fanciful (327 F.Supp. at 665, fn. 7; A 38, 42). Judge Ryan similarly said Abercrombie sneakers and fishing hat "admittedly were not fit for a safari." In this respect, the opinions of Judge Lasker and Judge Ryan concur, at least as to any factual finding. The foregoing uses, we submit, are clearly non-descriptive instances of fanciful uses of "Safari."

Assuming *arguendo* "Safari" may be descriptive when the word is used in connection with a safari hat or a safari jacket—but when used in the context of sneakers or fishing hats, it is a fanciful or suggestive use. *Feathercombs, Inc. v. Solo Products Corporation*, 306 F. 2d 251, 256 (2d Cir. 1962).

**"Safari" Is a Suggestive Mark as
Applied to Abercrombie's Goods**

Abercrombie's use of "Safari" as a trademark does not immediately convey to the purchaser the character of the goods sold. "Safari" is not an accurate or a descriptive term with respect to goods sold by Abercrombie; namely, men's and women's outer garments, hats, shorts, caps, belts, gloves, ties, scarves, shoes, woven cloth sporting goods, apparel, as recited in Abercrombie's Trademark

Registrations (PX-3, 5, 7), as well as Abercrombie's other products such as luggage, portable grills, ice chests, camping tents, axes, smoking tobacco, which are covered by Registrations outside of the record.

Depending on the use of particular goods, we submit Abercrombie's use of the trademark "Safari" is, at the least, in the nature of a suggestive mark; it is a mark which carries with it a distinctive connotation and an appeal to the discriminating and elite consumer.* It is, at most, an in-between mark.

The Courts have recognized the nature of this type of suggestive trademark. In *General Shoe Corporation v. Rosen*, 111 F.2d 95 (4 Cir. 1940), the Court held that the word "friendly" was a valid trademark as applied to shoes stating at page 98:

"Between these two extremes lies a *middle* ground wherein terms of mingled qualities are found. It cannot be said that they are primarily descriptive or that they are purely arbitrary or fanciful without any indication of the nature of the goods which they denominate. Such terms, indeed, shed some light upon the characteristics of the goods, but so applied they involve an element of incongruity, and in order to be understood as descriptive, they must be taken in a suggestive or figurative sense through an effort of the imagination on the part of the observer." (Emphasis ours.)

This same approach was taken in this Circuit in *Blisscraft of Hollywood v. United Plastic Co. et al.*, 294 F.2d

* Abercrombie's "Safari" Bermuda shorts is a good example.

694 (2d Cir. 1961), a case involving the use of the term "Poly Pitcher" as a mark for polyethylene pitchers. The Court, at page 700, applied the test that a term is not descriptive if it:

"* * * would not convey to a person who had never seen the pitcher, and who did not know what it was, any idea of its character, nor would it be an appropriate term to be used by a person desiring to describe it."

In *Apollo Shirt Co. v. Enco Shirt Co., Inc.*, 165 F.2d 471 (CCPA 1948) the Court refused to cancel "sportster" as a trademark for sport shirts. The Court said at page 472:

"The term is probably highly suggestive, but, in our opinion, it cannot properly be held as merely descriptive of the goods to which it is applied as required by the statute."*

In *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 205 F.2d 921 (7 Cir. 1953) the Court said that "Stronghold" was suggestive only when used with nails. At page 925 the Court stated:

"Although the word 'Stronghold' is *suggestive* of one of the attributes of plaintiff's nail with the annular thread, it is *not descriptive* of a nail, let alone that type of nail. A person unaware of the particular prod-

* Other examples of trademarks which were held to be suggestive and not descriptive are: "Alumicote", not descriptive of aluminum paint because it is not an aluminum coat, *Circle S Products Co. v. Powell Products, Inc.*, 174 F.2d 562 (7 Cir. 1949); "Streamlite", suggestive only as applied to flashlights; *Scoville Mfg. Co. v. U.S. Electric Mfg. Corp.*, 31 F.Supp. 115 (S.D.N.Y. 1940); "Back-A-Belt" not descriptive of material used for backing belts, *Supply Mfg. Co. v. King Trimmings, Inc.*, 220 F.Supp. 47 (S.D.N.Y. 1963).

uct of the manufacturer, upon seeing or hearing the name 'Stronghold,' would find it virtually impossible to identify the product to which it might have been applied." (Emphasis ours.)

Divorced from obviously descriptive uses of "Safari," "Safari" is not, *per se*, a descriptive term, within these precedents.

The basic issue presented here focuses on the use of "Safari." It has been used on a wide spectrum of goods by Abercrombie as a trademark and has been used in a descriptive sense by Abercrombie, Hunting World and others, particularly as to now-stylish jackets and pant combination which have been widely advertised as safari jackets.

In resolving this issue, the line to be drawn between the "right doing" of Abercrombie and Hunting World and the public is only one of determining where the use of "Safari" becomes non-descriptive. Cf. *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31 (2d Cir. 1969). We submit, when the use of "Safari" on goods as a trademark is suggestive or fanciful as opposed to descriptive, the trademark is valid.

POINT II

HUNTING WORLD'S USES ARE NOT FAIR OR DESCRIPTIVE WITHIN 15 U.S.C. §1115(b)(4).

Hunting World's uses of "HIPPO SAFARI", "CAMEL SAFARI", "SAFARI CHUKKA" for shoes, "MINISAFARITM" for a casual hat, "SAFARILAND-TM", "SAFARI COUNTRY" in advertising are not ordinary uses of the word "Safari", they are not descriptive uses and they do not come within the fair use exception under 15 U.S.C. §1115(b)(4). They are used as trademarks and were intended for trademark use.

That defendant *could* use "Safari" in a descriptive sense, does not require a finding that it did, or that it did in all instances. In *Venetianaire, supra*, this Court said (429 F.2d at p. 1082):

"* * * [Defendant's] use of 'Hygienic' infringed the trademark owned by plaintiff, even though the word 'hygienic' was capable of descriptive, and therefore noninfringing, use."

Shoes—"HIPPO SAFARI", "CAMEL SAFARI CHUKKA" and "SAFARI CHUKKA" Are Infringements

Hunting World has used "HIPPO SAFARI", "CAMEL SAFARI" and "SAFARI CHUKKA" on shoes in bold type, repetitively, with quotation marks, to attract public attention. That is the indicia of trademark use.

Judge Ryan erroneously said that the use was "a purely descriptive use to apprise the public of the type of product

by referring to its origin and use" (A 63). The marks mentioned above manifestly do not "apprise the public of the type of product." We submit "HIPPO-SAFARI" or "CAMEL SAFARI" is totally without meaning. One need only to ask himself what would he understand the product to be if he read an advertisement for a "HIPPO" or "CAMEL SAFARI"? As to the origin and use, Hunting World advertised and sold its shoes as being "tanned in England", "hand crafted by skilled European bootmakers" (PX-56); and with "solid brass buckles" (PX-56). The "Safari Chukka" is a trademark use; it is not a generic name.* Hunting World sold these shoes appealing to the affluent fashion world. The "SAFARI CHUKKA" was advertised as being "utterly luxurious" (PX-61).

We therefore disagree that Hunting World uses "Safari" generically or geographically descriptive. Judge Lasker had said that Hunting World's "use of * * * 'Safari' * * * is not purely descriptive," see 327 F.Supp. 665, fn. 7 (A 38, 42). And, the word "Safari" was used by both parties in a "fanciful" sense (327 F.Supp. at 665) (A 38).

Since secondary meaning is not required as a matter of law for a ^{NON-}descriptive use, we submit that "Safari" is a valid mark for shoes, that Hunting World has not used it descriptively or in accord with the fair use defense, 15 U.S.C. §1115(b)(4) and it has been infringed.

* Hunting World used "Kenya desert boot" (PX-59) as the generic name.

Hats—"MINISAFARI" Is an Infringement

What is a Minisafari? In the generic sense, it is a small safari. In the descriptive sense, when applied to a product, it describes a small item in someway associated with a safari.

When applied descriptively to a hat, it might be intended to describe a miniature safari hat. It does not describe Hunting World's* Fifth Avenue stylish, leisure hat, which is narrow brimmed and not designed for use on a safari.

A use involving "Mini" is not automatically a descriptive use. "Minigenerator" for a small generator is de-

*

THE SAFARI HAT
FOR TOWN & COUNTRY
IS
HERE...



OUR MINISAFARI™

The hat that will make you a fashion stand-out anywhere. Perfect with your casual suits, sport coats and slacks, or with your golf or riding outfits. The hat you've been waiting for... hand crafted for us, in Africa, by one of the world's great hatters. 100% pure fur felt in Impala brown. Pre-shaped crown; hand-shaped 2" raw edge brim. Hurry up men, before the girls beat you to it... to our surprise, the Minisafari has gone unisex! Sizes 6 1/2 to 7 1/2. With pleated silk Puggaree band.

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scriptive, while "Minitrim" for moldings for rooms and furniture is not. Compare, *In re Union Carbide Corporation*, 171 U.S.P.Q. 510 (TTA&B 1971) with *In re Champion International Corp.*, 178 U.S.P.Q. 639 (TTA&B 1973).*

Minisafari as applied to hats may describe a small safari hat, but defendant's hat is not a small safari hat. A safari hat is a generic name for a hat having a very wide brim. The brim is the outstanding and characterizing feature. A hat with a narrow brim, designed for use by the leisure class—a high style hat—is not known as a minisafari hat in the generic sense. Minisafari as applied to a hat does not describe a use or a quality.

Minisafari is a trademark use. And, Hunting World has recognized it as such as it used the symbol "TM" and filed an application for trademark registration for the mark. Hunting World's President testified that he regarded the word as a coined trademark (A 274).

In *Feathercombs, Inc. v. Solo Products Corp.*, 306 F.2d 251, 256-257 (2d Cir. 1962), this Court commented on the import of filing a trademark application on a word mark while, at the same time, contending that the mark is descriptive:

"If a competitor of a trade-mark owner seeks registration of the mark, that would be conclusive evidence

* The rationale is set forth at 178 U.S.P.Q. at 640:

"If the product is not of a type that is produced and encountered in the appropriate marketplace in miniature form, a designation consisting of the name of the goods modified by the word 'MINI' may be * * * no more than suggestive of the size of the goods except where, as in the case of 'MINI-SKIRT', a term has, through usage, become a common descriptive name for a particular article of merchandise."

of his intent to make a trade-mark use thereof.' 3 Callmann, *op.cit. supra*, §85.1(a), at 1670. For these reasons Solo cannot now justify its trade-mark use by contending that the term is merely descriptive."

See also this Court's prior decision as to the use of MinisafariTM as evidence of trademark use (461 F.2d at 1042) (A 51) Hunting World's use of "TM" connotes an intent to make trademark use of "Minisafari." Callmann terms this evidence to be conclusive, suggesting an estoppel from asserting use in a descriptive sense. Callmann, *Unfair Competition, Trademarks and Monopolies*, 3d Ed., Vol. 3, §85.1(a), pp. 990, 995, see fn 58. The case here against Hunting World is stronger than that in *Feathercombs*.

**Hunting World's Advertising Uses Highlight
"Safari" as a Trademark and Are Infringements**

Hunting World has prominently used "Safari" in advertising headlines in bold type, or with quotation marks or with combination words "HIPPO SAFARI," "CAMEL SAFARI," "SAFARI CHUKKA." Further emphasis has been achieved by multiple use of "Safari" in the same headline or elsewhere in the advertisement. These uses, along with "MINISAFARITM" and SAFARILANDTM were designed to attract public attention and were intended as trademark uses.

Hunting World's expanded use of "Safari" was a deliberate trademark use. Hunting World's argument that its use of "Safari" was descriptive or generic, or in good faith only to describe its goods must be considered in the

setting of its actual advertising and trademark uses. These are summarized:

SHOES—"Safari Chukka"*
 "Hippo Safari"***
 "Camel Safari Chukka"†

HATS—"Minisafari™"‡

ADVERTISING—"SAFARILAND™"¶
 "Safariland Ltd."¶¶
 "SAFARI Shoes from SAFARI-Land"*
 "Safari Clothes from Safari Country"***
 "Safari Shoes from Safari Country"****
 "The Safari Hat for Town & Country is Here . . ."‡

* Shoes, PX-43, pp. 3, 11, 15; PX-46, p. 3 (Cat. p. 66); PX-52; PX-53; PX-54; PX-56; PX-57; PX-59; PX-60; PX-61; PX-65 (Cat. p. 61).

** Shoes, PX-46, p. 3 (Cat. p. 66); PX-57.

† Shoes, PX-56; PX-65 (Cat. p. 69).

‡ Small brimmed hat, PX-44; PX-45; PX-46, p. 3 (Cat. p. 67); PX-48; PX-48A; PX-49; PX-50; PX-51; PX-65 (Cat. pp. 8-9, 68).

¶ Hats, Shoes, Clothing, PX-43, pp. 3, 11, 15; PX-44; PX-49; PX-50; PX-51; PX-52; PX-53; PX-54; PX-55; PX-59; PX-60; PX-61; PX-62.

¶¶ Hats, Shoes, Clothing, "just about everything", PX-71, pp. 19-20.

* Shoes, PX-43, p. 15; PX-46, p. 3 (Cat. p. 66); PX-52; PX-53; PX-54; PX-57; PX-60.

** Clothes, PX-62; PX-63; PX-65 (Cat. p. 26).

*** Shoes, PX-58.

‡ Small brimmed hat, PX-44; PX-45; PX-46, p. 3 (Cat. p. 67); PX-49; PX-50; PX-51.

These uses show an expanded advertising use of a trademark.

"But here the defendant obviously used the term 'as a symbol to attract public attention' * * *. That use of 'Hygienic' ['Safari'] infringed the trademark owned by plaintiff, even though the word 'hygienic' ['Safari'] was capable of descriptive, and therefore noninfringing use." *Venetianaire, supra*, 429 F.2d at 1082.

Hunting World's advertising and uses are therefore infringements. 15 U.S.C. §1114(1).

POINT III

THE USE OF "SAFARI" BY OTHERS ON JACKETS AND PANTS DOES NOT JUSTIFY HUNTING WORLD'S NON-DESCRIPTIVE USES.

Abercrombie has presented an exceptional record of recognition of "Safari" by leading stores and has been vigilant in preserving its rights as to the "Safari" trademark (PX-39, 40, 70). The great majority of these stores who appeared to be using "Safari" in a trademark sense have agreed voluntarily and without litigation to discontinue such wrongful uses.*

* A summary sheet entitled "Plaintiff's Policing of Safari as to Clothing, Resulting in Abatement of Infringement, Short of Litigation" (PX-39) and illustrative supporting detail (PX-40, PX-41, PX-42, PX-70) were introduced to show that Abercrombie has actually asserted its right to the exclusive use of the word "Safari" as a trademark and that where there has been trademark infringement, Abercrombie's rights have been recognized by others (A 124-133; 245-246).

After observing that the policing evidence showed that plaintiff had amply asserted its rights, Judge Ryan stated (A 133, lines 18 to 23):

"You have shown too that the right has been recognized and has been accepted by others in the industry and has been accepted and when it is called to their attention they have acknowledged and have recognized the fact that Abercrombie & Fitch has an exclusive right to the use of that word Safari as a trade name in the industry."

The number of such occurrences for any single store that used "Safari" in a trademark sense is minimal, except for jacket-pant combinations. Most of the stores that used "Safari" as a trademark did so without advice from counsel. Some expressed the view that their use was not a trademark use (PX-70, J, K) and others, that the use was an inadvertent, or a surprising oversight, or was unwittingly used (PX-70, A, B, E, G, M; PX-40, A, C, E, F, H, I, K, M).

As we stated, most of Hunting World's advertising evidence offered on descriptiveness involved one basic product—jackets or jacket suits (DX-A, D, E, F, H, I, J, K, U, X, AA, CC, DD, FF, GG, LL).^{*} Aside from these uses, most of the other uses are proper descriptive uses or improper trademark uses.

Improper uses prove nothing. In *Admiral Corp. v. Penco, Inc.*, 203 F.2d 517, 521 (2d Cir. 1953):

"Moreover, as the plaintiff says, these are mere third-party uses, perhaps substantially or wholly wrongful

^{*} We recognize that Abercrombie has unfortunately used Safari improperly in a number of instances. Such practices do not amount to abandonment of trademark rights. These mistakes are not legally fatal and can be corrected.

and inadequate to justify defendant's wrongful use. *Ward Baking Co. v. Potter Wrightington*, 1 Cir. 298 F. 398, 402; *Bond Stores Incorporated v. Bond Stores, Inc.*, 3 Cir., 104 F.2d 124, 125 * * *

See also *Great Atlantic & Pacific Tea Co. v. A & P Radio Stores, Inc.*, 20 F.Supp. 703, 706 (E.D.Pa. 1937).

Thus, the advertisement evidence introduced by defendant does not detract from Abercrombie's position that Hunting World's trademark uses of "Safari" are wrongful infringements.

POINT IV

SECONDARY MEANING IS NOT REQUIRED FOR TRADEMARK VALIDITY WHEN THE UNDERLYING MARK IS USED IN A FANCIFUL OR NON-DESCRIPTIVE SENSE.

We urge as a basic point on this appeal that secondary meaning is not a prerequisite to validity for words used non-descriptively on goods as trademarks.

If it were the law that plaintiff must prove secondary meaning for fanciful or non-descriptive use of its registered trademarks, then word mark registrations would be stripped of their statutory presumption of validity.* See *Aluminum Fabricating Co. of Pittsburgh et al. v. Season-all Window Corp.*, 259 F.2d 314, 316 (2d Cir. 1958); *Venetian-*

* In 1937, the Trademark Examiner initially rejected Abercrombie's Application to register "Safari" as "descriptive of the goods in that it signifies they are intended for use in 'hunting expedition'" (PX-4, p. 7). As the official file notes, the rejection was withdrawn (PX-4, p. 7). Secondary meaning was not required in 1937, and it should not be required now. The statutory presumption of validity must be given meaning and cannot be totally ignored.

aire Corp. v. A & P Import Co., 429 F.2d 1079, at 1080 (fn.). The presumption of validity is recognized in this Circuit.

In *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 661 (2d Cir. 1970) this Court held that secondary meaning was unnecessary for distinctive marks but was a prerequisite for a mark descriptive of a product's use or function, stating:

"The first question is whether Bassett's mark 'Trim' is descriptive of the function performed by the implements or whether it is so distinctive that, on its face, it identifies the producer. If it is the latter, Bassett does not have to show that the mark acquired secondary meaning."

The Court held "Trim" to be descriptive of the function of a cuticle trimmer and then required a showing of secondary meaning.

Further, secondary meaning was not required in *Veritanaire*, see 429 F.2d at 1082. See also, *Artype, Inc. v. Zappulla*, 228 F.2d 695, 698 (2d Cir. 1955).

We submit that it is the well established law that secondary meaning is a burden to be carried only when the marks in issue are descriptive. In view of the fact that the marks are *admittedly* not descriptive, it was error for the Court below to have invalidated the marks on the ground that secondary meaning was not proven.

POINT V

THE COURT ERRONEOUSLY ORDERED ALL ABERCROMBIE'S "SAFARI" REGISTRATIONS TO BE CANCELLED.

Although most of the goods identified in Abercrombie's registrations* are not sold by Hunting World with any usage of "Safari", and, therefore, are not in issue or of record. Judge Ryan, however, ordered that *all* of Abercrombie's registrations for "Safari" be cancelled.

This ruling thus applied to "Safari" registrations which were not introduced in evidence. Those registrations, clearly non-descriptive, relate to luggage, a portable grill, insulated ice chests, camping tents, axes and smoking pipe tobacco.**

"Safari" is not descriptive or the generic name of any of these products. If a consumer were to be asked the question: What is "Safari" smoking tobacco? he could not answer positively because the word safari would not convey

* Trademark Registration No. 358,781 (PX-3) issued in 1938 for:
Men's jackets, coats, trousers, breeches, shorts for outer wear, caps, hats and helmets, and women's coats, skirts for outer wear, trousers, breeches and hats.

Trademark Registration No. 652,098 (PX-5) issued in 1957 for:
Men's and women's shirts, shoes, belts, fishing vests, wading jackets and men's swim trunks.

Trademark Registration No. 703,729 (PX-7) issued in 1960 for:
Woven-cloth sporting goods apparel such as pants, shirts, skirts, dresses, shorts, sweaters, jackets, coats, raincoats, gloves, scarves, ties, hats, socks, and underwear.

** Safari	768,332	4/21/64	Luggage
Safari	770,336	5/26/64	Portable Grill
Safari	777,180	9/22/64	Insulated Ice Chests
Safari	779,394	11/ 3/64	Camping tents
Safari	803,036	2/ 1/66	Axes
Safari	856,889	9/17/68	Smoking Tobacco

These registrations were not in the complaint and expressly not introduced into evidence (A 73).

any description of the nature, quality, or use of such tobacco. The same question may be asked as to the other products: What is a "Safari" grill?; or, what are "Safari" ties?; or, what are "Safari" shoes? These examples are sufficient to demonstrate that "Safari" is not inherently or by use, a descriptive trademark. It can be fanciful or suggestive and thus be a proper word trademark. "Safari" for "Ice Chests" is another clear example of a suggestive use.

The Court's decision to cancel all of Abercrombie's registrations is premised on the same legal error in not recognizing that "Safari" could be a valid trademark for non-descriptive uses. The Court did not draw any line whatsoever in determining Abercrombie's "right doing" under *Thermos*,* and did not carefully evaluate the specific uses of Abercrombie as set forth in the registrations to determine whether they were fanciful or suggestive or purely descriptive. It appears the Court simply concluded that inasmuch as safari is a dictionary word, it is incapable of performing a trademark function. That conclusion, we submit, is wrong as a matter of law, as most trademarks are dictionary words.

Conclusion

An ordinary word is capable of functioning as a trademark. Word-marks such as "rainbow", "hygienic", "stronghold", and "friendly" have been held to be capable of trademark use, depending on the nature of the goods to which they are applied.

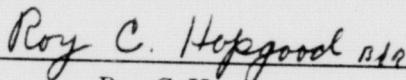
* King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31 (2d Cir. 1969).

The word "safari" is subject to the same principle. "Safari" may have inherent descriptive meaning and wide use in connection with one or two products—a safari hat and a safari jacket; but, otherwise, "Safari" can be a desirable, attractive, suggestive trademark. Abercrombie has used "Safari" in a fanciful and suggestive sense on a wide variety of products and, we submit, such uses are valid trademark uses.

Like any other member of the public, Hunting World may use "Safari" to the extent it has become part of generic names of goods, and may further use it fairly to describe its articles within the fair use defense, 15 U.S.C. §1115(b)(4). However, it should be enjoined from using "Safari" in "Minisafari", "Hippo Safari", "Camel Safari Chukka", and "Safariland" as these are uses in the trademark sense.

We submit that the judgment of the Court below was erroneous and should be reversed in all respects.

Respectfully submitted,



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March 14, 1975

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Addendum

**Sec. 8(a) (15 U.S.C. 1058a). Duration of registration—
Cancellation at end of 6 years unless affidavit of use filed**

Each certificate of registration shall remain in force for 20 years: *Provided*, That the registration of any mark under the provisions of this Act shall be canceled by the Commissioner at the end of 6 years following its date, unless within 1 year next preceding the expiration of such 6 years the registrant shall file in the Patent Office an affidavit showing that said mark is still in use or showing that its nonuse is due to special circumstances which excuse such nonuse and is not due to any intention to abandon the mark. Special notice of the requirement for such affidavit shall be attached to each certificate of registration.

SECTION 8, LANHAM ACT

Sec. 15 (15 U.S.C. 1065). Incontestability under certain conditions of right to use mark

Except on a ground for which application to cancel may be filed at any time under subsections (c) and (e) of section 14 of this Act, and except to the extent, if any, to which the use of a mark registered on the principal register infringes a valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of the publication under this Act of such registered mark, the right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for 5 consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable: *Provided, That—*

(1) there has been no final decision adverse to registrant's claim of ownership of such mark for such goods or services, or to registrant's right to register the same or to keep the same on the register; and

(2) there is no proceeding involving said rights pending in the Patent Office or in a court and not finally disposed of; and

(3) an affidavit is filed with the Commissioner within 1 year after the expiration of any such 5-year period setting forth those goods or services stated in the registration on or in connection with which such mark has been in continuous use for such 5 consecutive years and is still in use in commerce, and the other matters specified in subsections (1) and (2) hereof; and

(4) no incontestable right shall be acquired in a mark which is the common descriptive name of any article or substance, patented or otherwise.

* * *

Sec. 32(1) (15 U.S.C. 1114(1)). Remedies—Infringement

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive (Amended Oct. 9, 1962, 76 Stat. 769).

Sec. 33(b) (15 U.S.C. 1115b). Same—When conclusive evidence of exclusive right to use mark

If the right to use the registered mark has become incontestable under section 15 hereof, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 15 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

* * *

(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trade or service mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin;

* * *

Service of 8 copies of the
within Brief is hereby
admitted this 14 day of
March 19 71

Signed Richard W. Wels ESP

Attorney for Defendant-appellee